

NOTES

THE AMERICAN-EASTERN APPLICATION: CRUCIAL TEST OF CAB MERGER POLICY

The railman's cry of "merge or die" may soon become the watchword of the air transport industry. Even though airlines are subject to detailed regulation—to implement safety as well as economic objectives—, including limitations on entry,¹ price regulation, and in certain cases, federal subsidy,² competition is permitted "to the extent necessary" to ensure a healthy air transport system "adapted to the needs" of commerce, the postal service, and national defense.³ The United States maintains the world's only competitive airline system, and individual airlines are complaining not about regulation but about regulated competition.⁴ In most major markets, there are at least two trunk airlines competing for supremacy and survival, and although the public has benefited from this competition in long-haul markets, service has deteriorated in short-haul and intermediate markets as long-haul equipment has become increasingly unsuited for short trips.⁵ Indeed, the advent of the jet age has set off an equipment race "unparalleled in any transportation system and unlikely to be duplicated."⁶ Gains in net income have not kept pace with increases in gross traffic and revenue, and competition from other forms of transportation, particularly the automobile, has become increasingly effective.⁷ Because of the effects of the present degree of competition, the problems of equipment financing and low earnings, and the prospect that supersonic transport may magnify these difficulties, both the airlines and the Civil Aeronautics Board have been considering merger as a possible solution.⁸

The most recent merger application—that of American and Eastern Airlines, the second and fourth largest air carriers in the United States—is in many ways unprecedented. It presents a crucial test of CAB policy

¹ See generally Maclay & Burt, *Entry of New Carriers into Domestic Trunkline Air Transportation*, 22 J. AIR L. & COM. 131 (1955).

² See Barnes, *Airline Subsidies—Purpose, Cause and Control*, 26 J. AIR L. & COM. 311, 321 (1959); Hale & Hale, *Competition or Control IV: Air Carriers*, 109 U. PA. L. REV. 311, 358 (1961) (subsidy tends to remove "both the carrot and the stick often thought necessary to goad competitors into action").

³ Federal Aviation Act of 1958, § 102, 72 Stat. 740, 49 U.S.C. § 1302 (1958); see Berge, *Competition to the Extent Necessary: An Historical Introduction*, 22 J. AIR L. & COM. 127, 130 (1955).

⁴ See Tipton & Gewirtz, *The Effect of Regulated Competition on the Air Transport Industry*, 22 J. AIR L. & COM. 157, 158 (1955).

⁵ Barnes, *supra* note 2, at 321.

⁶ *Ibid.*

⁷ See Tipton & Gewirtz, *supra* note 4, at 158, 175.

⁸ See, e.g., Addresses by CAB Chairman Boyd, Economic Club of Detroit, Jan. 8, 1962, and Aero Club of Washington, D.C., Feb. 18, 1961.

and may significantly alter the future structure of the airline industry. The desirability, probability, and ultimate impact of approval of the proposed merger can best be evaluated in the context of past CAB merger decisions.

I. DETERMINANTS OF CAB MERGER POLICY

A. Statutory Standards

Section 7 of the Clayton Act bans mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."⁹ But under section 414 of the Federal Aviation Act, Board approval immunizes an airline merger from attack under the antitrust laws.¹⁰ And section 408(b) of the act directs the Board to approve a merger unless it is inconsistent with the public interest policies enumerated in section 102:¹¹

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the National defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

However, section 408(b) also contains the proviso that a merger shall not be approved if it would result in monopoly and thereby restrain com-

⁹ 38 Stat. 731 (1914), 15 U.S.C. § 18 (1958).

¹⁰ The Justice Department may, however, intervene in the Board proceeding and, indeed, has done so in the American-Eastern Merger Case, *petition filed*, No. 13355, CAB, Feb. 20, 1962.

¹¹ 72 Stat. 740 (1958), 49 U.S.C. § 1302 (1958). See, e.g., American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., 7 C.A.B. 365, 371-72 (1946); Pan-American Airways, Inc., 2 C.A.B. 503, 505 (1940).

petition or jeopardize another air carrier. The Board has interpreted monopoly as "a particular degree of control of air transportation" rather than a general tendency to stifle competition and control prices,¹² and restraint of competition and jeopardy to another carrier have been grounds for rejection only when caused by monopoly.¹³

To the extent that it requires merger approval "unless" certain findings are made, the Federal Aviation Act is unique among regulatory statutes. According to a recent Senate Commerce Committee report, the phrasing of the statute "indicates some intent by Congress to favor mergers, where possible."¹⁴ Air mergers, therefore, are judged by the policies of the antitrust laws only to the extent that those policies are subsumed in the public interest criteria of section 102.¹⁵

B. Changing Views Toward Competition

In the early forties, the "Big Four"—United, American, TWA, and Eastern—had established their position of industry dominance and competed for traffic on the high density routes. However, competition was generally lacking, and many local and area monopolies existed.¹⁶ The

¹² See, e.g., United Air Lines Transport Corp., Acquisition of Western Air Express Corp., 1 C.A.A. 723, 732-34 (1940).

¹³ See *id.* at 737. It has been suggested that with this construction the Board has read the monopoly proviso out of the statute. Comment, 62 COLUM. L. REV. 851, 853 (1962). Of course these factors—restraint of competition and jeopardy to another carrier—are still taken into account as elements of "public interest." See note 11 *supra* and accompanying text.

¹⁴ S. REP. NO. 445, 87th Cong., 1st Sess. 701 (1961). Every merger involves transfer of a certificate. Section 401 requires an affirmative finding of public interest before a certificate transfer is approved; this section should not, however, alter the merger provision and, in fact, it has been held not to affect the determination of public interest for merger purposes. See, e.g., Acquisition of Mayflower Airlines, Inc., 4 C.A.B. 680, 681 (1944); Comment, 62 COLUM. L. REV. 851, 862, n.94 (1962).

¹⁵ Cf. *McLean Trucking Co. v. United States*, 321 U.S. 67, 84-85 (1944) (interpreting the antitrust immunity of the Interstate Commerce Act). See generally FULDA, *COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION* (1961); Hale & Hale, *Competition or Control IV: Air Carriers*, 109 U. PA. L. REV. 311 (1961); Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1962); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). Mr. Justice Douglas, dissenting in *McLean*, *supra* at 93-94, suggested that mergers be approved only upon a finding that the policy of the Transportation Act would otherwise be thwarted. Professor Louis B. Schwartz has proposed the following congressional resolution:

It is the policy of the United States that no arrangement involving exemption from the antitrust laws shall be approved unless the approving agency finds that it is impractical to carry out the aims of regulation in a manner more consistent with antitrust objectives.

Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. 22, pt. 1, vol. 1, at 91 (1957). According to CAB counsel and the Justice Department, however, the Board has adopted the rationale of the dissent in *McLean* that antitrust laws must be considered. See Brief of Bureau of Economic Regulation, pp. 45-47, Brief of United States, p. 17, American-Eastern Merger Case, No. 13355, CAB, July 31, 1962.

¹⁶ Taaffe, *Map Analysis of U.S. Airline Competition*, 25 J. AIR L. & COM. 121, 125-29 (1958).

Board adopted and has maintained a somewhat vague policy of discouraging expansion of the large carriers and encouraging the small and medium-size carriers to merge into larger and fewer systems.¹⁷ A qualified presumption in favor of competition¹⁸ was established except as to local service, or "feeder" lines which had limited traffic potential.¹⁹ In 1945, the Board enthusiastically endorsed airline competition:

The greatest gain from competition, whether actual or potential, is the stimulus to devise and experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business, including the rendering of better service to the country, and to afford the Government comparative yardsticks by which the performance of the United States operators can be measured. . . . No effective substitute for healthy competition as a stimulus to progress and efficiency can be found in monopoly. The stimulus to an imaginative management that results from the competitive efforts of business rivals to secure patronage and trade cannot be matched as a motivating force for the public welfare even by the private profit incentive, for the latter might be satisfied with moderate traffic at high rates while public welfare would require mass transportation at lower fares and charges. The improvements which flow from a competitive service cannot be decreed by administrative fiat.²⁰

The following year the Board refined its concept of competition to a "regulated competition which seeks to avoid the stifling influence of monopoly on the one hand and the economic anarchism of unrestrained competition on the other."²¹

In the late forties, although the regional carriers were becoming competitive with the Big Four, the Board did little to promote competition, for its primary concern was the termination of subsidies. From 1948 through 1955, earnings, profits, and traffic rose steadily while the degree of competition remained essentially static—more than half the major air routes were served on a monopoly basis. Trunklines were no longer being subsidized, and air traffic increased enormously during the Korean War period.²² To heighten competitive pressure on the Big Four and strengthen

¹⁷ See Bluestone, *The Problem of Competition Among Domestic Trunk Airlines*, 21 J. AIR L. & COM. 50, 79 (1954).

¹⁸ See TWA North-South California Service Case, 4 C.A.B. 373 (1943); Braniff Airways, 2 C.A.B. 353, 386 (1940); Gellman, *The Regulation of Competition in U.S. Domestic Air Transportation: A Judicial Survey and Analysis*, 24 J. AIR L. & COM. 410, 421 (1957).

¹⁹ See *id.* at 419.

²⁰ Northeast Airlines, Inc., North Atlantic Route Case, 6 C.A.B. 319, 325-26 (1945).

²¹ IATA Traffic Conference Resolution, 6 C.A.B. 639, 643-44 (1946).

²² Bates, *Current Changes in Trunkline Competition*, 22 J. AIR L. & COM. 379, 389 (1955).

weaker carriers, the Board awarded new routes.²³ Since price competition was minimized by rate regulation, the airlines pursued product differentiation by emphasizing scheduling, equipment, and in-flight and ground services.²⁴ In the past few years, competitive scheduling on parallel flights has produced significant overcapacity, and jet re-equipping has imposed a heavy debt on the industry, with the result that Board Chairman Boyd has repeatedly suggested that "a series of mergers or consolidations might be beneficial to the trunkline industry and in the public interest."²⁵

II. A CASE ANALYSIS OF AIR MERGER HISTORY

A. "Public Interest" Criteria

Past merger applications have been approved only upon satisfaction of four basic "public interest" criteria which the Board has refined from the general policies enumerated in section 102: the effect of merger on the applying parties, on employment, on other carriers, and on the "system."

1. Effect on Applying Parties

Ordinarily the CAB first considers the terms of a merger agreement. In particular, the purchase price must be reasonable according to the acquiring airline's ability to pay and the value of the property to be transferred.²⁶ An unreasonable price may deplete the purchaser's assets and result in an impairment of service or an imposition of subsidy burden on the public.²⁷ In 1946, the Board refused to permit Braniff Airways to absorb a Mexican carrier on the ground that unprofitable routes to Mexico would cause a financial drain on Braniff and impair its ability to obtain needed capital and adequately respond to the swiftly changing requirements of air transportation.²⁸ In an earlier acquisition case, the Board

²³ See Taaffe, *supra* note 16, at 132-37; Trial Brief of American Airlines, Inc. and Eastern Air Lines, Inc., p. 10, American-Eastern Merger Case, No. 13355, CAB, May 7, 1962. See also Southwest-Northeast Service Case, 22 C.A.B. 52, 56 (1955), *supplemental opinion*, 23 C.A.B. 42 (1956): "It is vital . . . to so develop the national air route structure as to tend to decrease rather than increase the gap between the relative size of the Big Four carriers and the smaller trunks."

²⁴ See Gellman, *The Regulation of Competition in U.S. Domestic Air Transportation: A Judicial Survey and Analysis*, 25 J. AIR L. & COM. 148, 155 (1958).

²⁵ See, e.g., Addresses by CAB Chairman Boyd, Aero Club of Washington, D.C., Feb. 28, 1961, p. 3, and Connecticut General Symposium, Hartford, Conn., Nov. 3, 1961, p. 6.

²⁶ See Zook, *Recasting the Air Route Pattern by Airline Consolidations and Mergers*, 21 J. AIR L. & COM. 293, 300 (1954). The Board also seeks to prevent increases in mail-pay rate bases due to merger valuations. *Id.* at 305. Evidence of arm's-length negotiations is usually accepted by the Board as prima facie indication of a fair and reasonable price. See, e.g., United-Western, Acquisition of Air Carrier Property, 8 C.A.B. 298, 314 (1947), *amended*, 11 C.A.B. 701 (1950), *modified sub nom.* Western Air Lines v. C.A.B., 194 F.2d 211 (9th Cir. 1952).

²⁷ See National-Caribbean-Atlantic Control Case, 6 C.A.B. 671, 677-79, 682 (1946); Acquisition of Marquette Airlines by TWA, 2 C.A.B. 1, *supplemental opinions*, 2 C.A.B. 409 (1940), 3 C.A.B. 111 (1941).

²⁸ Braniff Airways, Inc., Acquisition of Aerovias Braniff, S.A., 6 C.A.B. 947, 956-59 (1946).

invalidated a "good will" valuation because the purchase price was fifteen times the value of the tangible property to be transferred and the good will was found to be practically worthless. This merger was eventually approved at a lower purchase price which accounted for the "extremely high traffic potential" of the acquired route; the Board recognized that operating rights could be more valuable to a purchaser than to the seller and found that the proposed price would not unduly burden either party.²⁹

In evaluating the parties' need for merger, the Board has considered a carrier's inherent route structure deficiencies,³⁰ individual inability to obtain needed equipment,³¹ protection of shareholder and creditor investments,³² and the prospect of operating economies, reduced unit costs,³³ or improved services to one of the parties' routes.³⁴

2. Labor Protection

To forestall labor disputes which might delay or even prevent beneficial mergers and to ensure that investors and the public do not benefit at the employees' expense, the Board includes protective labor provisions in most merger orders. Despite the absence of express statutory authority, the CAB's power to impose such conditions has been upheld.³⁵ At first, the Board used the Burlington formula³⁶ for railroad abandonments as its model for protective labor provisions, compensating employees for lost salary resulting from furlough, termination of employment, and transfer to lower-pay positions, as well as for moving and transportation expenses incident to transfer to a new location.³⁷ In the *Braniff-Mid-Continent Merger Case*,³⁸ however, the Board adopted a modified version of the

²⁹ Acquisition of Marquette Airlines by TWA, 2 C.A.B. 1, 14, *supplemental opinions*, 2 C.A.B. 409, 413-14 (1940), 3 C.A.B. 111 (1941).

³⁰ See Eastern-Colonial, Acquisition of Assets, 18 C.A.B. 781, 784-86 (1954).

³¹ See *id.* at 785; Delta-Chicago & Southern Merger Case, 16 C.A.B. 647, 691 (1952).

³² See United-Capital Merger Case, 1A Av. L. REP. ¶21,132 (CAB, April 3, 1961), *aff'd sub nom.* Northwest Airlines, Inc. v. CAB, 303 F.2d 395 (D.C. Cir. 1962).

³³ See Delta-Chicago & Southern Merger Case, 16 C.A.B. 647, 674, 694 (1952).

³⁴ See Western Air Lines, Inc., Acquisition of Inland Airlines, 4 C.A.B. 654, 661 (1944).

³⁵ Kent v. CAB, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953). See Zook, *supra* note 26, at 305-09. The Federal Aviation Act of 1958, § 408(b), 72 Stat. 767, 49 U.S.C. § 1378(b) (1958), does provide for approval of mergers "upon such terms and conditions as it finds to be just and reasonable and with such modifications as it may prescribe . . ." Compare Railway Labor Executives' Ass'n v. United States, 339 U.S. 142 (1950); United States v. Lowden, 308 U.S. 225 (1939).

³⁶ See Chicago B. & Q.R.R. Abandonment, 257 I.C.C. 700 (1944).

³⁷ See generally Brown, *Employee Protection and the Regulation of Public Utilities: Mergers, Consolidations, and Abandonment of Facilities in the Transportation Industry*, 63 YALE L.J. 445 (1954).

³⁸ 15 C.A.B. 708, 710-19 (1952).

Burlington formula that has since been used in many cases.³⁹ It ordered dismissal and displacement allowances, reimbursement for travel and moving expenses, integration of seniority lists, and arbitration of disputes, but refused to hinge approval on a new labor-management agreement, for then management would have to assent to every labor proposal or abandon the merger. The Board may impose labor conditions retroactively if forecasts relied on at the hearing indicating that protective provisions will be unnecessary, subsequently prove to have been incorrect.⁴⁰

3. Effect on Other Carriers.

The Board normally examines a proposed merger to determine whether it will cause excessive diversion from other carriers,⁴¹ although the weight accorded this factor varies considerably. In its brief to the Examiner in the *American-Eastern* case, American contends that the impact on other carriers should not be controlling. "If a merger otherwise makes sense and will contribute to the development of a rational air transportation system, the adverse effect upon other carriers, which in all likelihood will be minor and temporary, should not be allowed to stand in the way of progress—any more than one carrier should be able to prevent a competitor from introducing an important technological improvement in the industry."⁴²

There is, however, a statutory pronouncement directing the Board to avoid destructive competition and maintain sound economic conditions.⁴³ And in considering the possibility of future destructive competition, it is appropriate to examine the past competitive practices of the merging parties. A Justice Department memorandum to the Examiner in *American-Eastern*, citing the federal court practice in merger and related cases, argues that evidence of past unfair competitive practices is relevant to determine "whether a merging firm has a propensity to abuse its economic power."⁴⁴ Indeed, a history of business abuses is persuasive evidence that the applying parties are not to be trusted with the magnified influence and power that merger would afford.

³⁹ See Brown, *supra* note 37, at 465-68. In *Flying Tiger-Slick Merger Case*, 18 C.A.B. 326, 329 (1954), the Board emphasized that seniority disputes are best settled through negotiated agreements and that other methods—arbitration, integration by Board action, and resolution by economic pressure—are, in that order, less desirable.

⁴⁰ *United-Western, Acquisition of Air Carrier Property*, 8 C.A.B. 298, 311 (1947), *amended*, 11 C.A.B. 701, 707-11 (1950), *modified sub nom. Western Air Lines, Inc. v. CAB*, 194 F.2d 211 (9th Cir. 1952) (upholding Board's power to impose labor conditions retroactively).

⁴¹ See, e.g., *American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc.*, 7 C.A.B. 365, 378-79 (1946); Comment, 62 COLUM. L. REV. 851, 870-71 (1962).

⁴² Brief of American Airlines, Inc., p. 26, *American-Eastern Merger Case*, No. 13355, CAB, July 31, 1962.

⁴³ Federal Aviation Act of 1958, §§ 102(b), (c), 72 Stat. 740, 49 U.S.C. §§ 1302(b), (c) (1958).

⁴⁴ Memorandum of United States, p. 2, *American-Eastern Merger Case*, No. 13355, CAB, Feb. 26, 1962.

4. The "System"

The broadest factor, and the one most frequently articulated as being determinative, has been the effect of a proposed merger on the national air transport "system" and on proper "balance" in that system. This factor requires an analysis of the level of competition, service to the public, integration of lines, and the general condition and structure of the industry—in short, an analysis in terms of the policies dictated by section 102.⁴⁵

The Board has often formulated this public interest criterion in terms of rationally integrated route patterns that will generate improved service and economy of operation.⁴⁶ Improved service resulting in increased traffic is generally anticipated when a merger creates the possibility of through-flight service instead of two-carrier connecting flights.⁴⁷ Yet the principle of physical integration of operation and traffic flows has not been uniformly applied.⁴⁸ In the *National-Caribbean-Atlantic Control Case*,⁴⁹ merger was denied, partly because no fusion of physical property in a contiguous area and no development of an integrated system would have resulted. Two years earlier, however, Western was permitted to acquire Inland despite an obvious lack of geographical integration.⁵⁰ In the first feeder merger,⁵¹ an integrated system was one of three principal criteria applied, but in the next case,⁵² the Board stated that complementary routes were not essential to a merger of local service carriers.

In 1940, the Board announced that any merger which would retard the development of an air transport system properly adapted to present and future national needs "by stifling normal competition or by encouraging destructive competition" must be deemed inconsistent with the public interest.⁵³ But generalities like "balanced system," "integration," and "destructive competition" become meaningful only when traced through a line of merger decisions which illustrate the Board's changing emphasis.⁵⁴

B. Merger Decisions Since 1940

1. Non-Trunkline⁵⁵ Mergers

Mergers of small, regional carriers are important not only because they reveal developing theories of integration and regulated competition, but

⁴⁵ See note 11 *supra* and accompanying text.

⁴⁶ See Zook, *supra* note 26, at 295-96.

⁴⁷ See, e.g., Braniff-Mid-Continent Merger Case, 15 C.A.B. 708, 728, 733-34 (1952) (Examiner's report).

⁴⁸ See Bluestone, *supra* note 17, at 80.

⁴⁹ 6 C.A.B. 671, 676 (1946).

⁵⁰ See Western Airlines, Inc., Acquisition of Inland Airlines, 4 C.A.B. 654 (1944).

⁵¹ Monarch-Challenger Merger Case, 11 C.A.B. 33 (1949).

⁵² Arizona-Monarch Merger Case, 11 C.A.B. 246, 247 (1950).

⁵³ See United Air Lines Transport Corp., Acquisition of Western Air Express Corp., 1 C.A.A. 739, 745 (1940).

⁵⁴ The Board's standards in merger cases are criticized in CAVES, AIR TRANSPORT AND ITS REGULATORS 181 (1962).

⁵⁵ The difference between trunkline and local service carriers is summarized in Comment, 62 COLUM. L. REV. 851, 866 n.116 (1962).

also because of the possibility that earlier conceptions of regional systems may eventually be applied to the national structure as distances are constantly diminished by technological advances.

a. The Alaska Pattern

In *Wien Alaska Airlines, Inc., Acquisition of Mirow Air Service* (1941),⁵⁶ Wien was permitted to purchase an airline which its owner had inherited but was unable to manage. Although Wien would become the largest carrier in the Seward Peninsula area, the Board did not find monopoly or destruction of "competitive balance" since competing carriers were handling sufficient traffic. The Board was convinced that a unified operation would produce improved public service through greater efficiency and economy.

In *Marine Airways-Alaska Transport, Consolidation* (1942),⁵⁷ the applicants served the same routes in southeastern Alaska with approximately equal facilities, traffic volume, and equally meager loads. Having unsuccessfully tried facilities and personnel interchange, they applied for merger. Approval was grounded on the proposition that parallel service is economically unsound when traffic volume is insufficient to support it. The possibility of eliminating uneconomical duplication without substantially lessening competition made consolidation particularly desirable.

In 1944, the attempted acquisition of Cordova Air Service by Alaska Airlines was halted because the merger would give Alaska Airlines an overwhelming competitive advantage. Alaska had already swallowed three other carriers and was the biggest in the territory; it had penetrated every major terminal except Cordova's route. The Board held the merger inconsistent with the public interest since it would stifle the growth of a balanced, competitive local system.⁵⁸ Three years later, Wien Alaska Airlines was permitted to acquire Ferguson to provide more direct service, better equipment, safer operation, and a better development of traffic potential in the Hughes area.⁵⁹ Competition was lessened only by a reduction from five to four carriers between five points.⁶⁰ Later that year, six small carriers which had suffered equipment shortages and financing difficulties on routes in southwest Alaska consolidated with Board approval to form a strong system of integrated routes with better connections and scheduling and more single-carrier service.⁶¹ The consolidated carrier would not have a monopoly because it would compete with at least one of three larger airlines at all points.

⁵⁶ 3 C.A.B. 207 (1941).

⁵⁷ 3 C.A.B. 315 (1942).

⁵⁸ Acquisition of Cordova Air Service, Inc., by Alaska Airlines, Inc., 4 C.A.B. 708 (1944).

⁵⁹ Acquisition of Ferguson Airways, Inc., by Wien Alaska Airlines, Inc., 7 C.A.B. 769 (1947).

⁶⁰ *Id.* at 774.

⁶¹ Northern Consolidated Airlines, Inc., 8 C.A.B. 110 (1947).

b. Local Service Carriers

Shortly after World War II, the CAB certified local service carriers on an experimental subsidy basis to serve communities smaller than those receiving scheduled airline service from trunk carriers by "feeding" passengers into the long-haul routes;⁶² it was anticipated that these carriers would not be competitive with the trunklines. Thus, the first merger application by feeders—*Monarch-Challenger Merger Case* (1949)⁶³—was not approved until the Board was assured that trunkline traffic would not be diverted. The Board's approval was also based on a finding that integration over the inter-mountain region between Salt Lake City and Denver would be accompanied by a growth in inter-area traffic; that a more strategic placing of pilots, better utilization of equipment, and reduction of personnel and facilities would cut operating expenses without creating monopoly and would decrease the mail-pay subsidy requirement for the combined system.⁶⁴

In the next feeder merger case, the Board apparently abandoned the integration requirement for local service carriers despite the dissent's charge of an unwarranted departure from the feeder-experiment goal of separate lines in separate areas.⁶⁵ The majority stated that a requirement of two complementary lines would recognize a necessity for local operators to provide long-haul transportation. Actually, merger was probably approved because of a need for speedy activation of the acquired carrier's routes which had not been served for a year and a half.⁶⁶ The next year the Board distinguished this case and, in disapproving a merger that would have joined Southwest Airways, serving Oregon, with West Coast Airlines, serving California, reaffirmed its policy of confining local carriers to particular service areas in order to insulate them from trunk-type pressures.⁶⁷

Following a CAB suggestion in the *Southwest-West Coast Merger Case*,⁶⁸ West Coast then sought to join with Empire, whose routes were in the same general area and could easily be integrated. In approving the merger⁶⁹ which brought West Coast into competition with United at

⁶² See Address by CAB Chairman Boyd, Air Transportation Institute, Washington, D.C., Nov. 18, 1960, p. 3.

⁶³ 11 C.A.B. 33 (1950).

⁶⁴ In 1949, the Board also refused to allow common control of a feeder and a large irregular carrier, emphasizing that the feeder experiment required control and direction by airlines without the distraction of other carrier operations. *Turner Airlines, Inc., Transfer of Certificate*, 10 C.A.B. 695 (1949).

⁶⁵ *Arizona-Monarch Merger Case*, 11 C.A.B. 246, 247 (1950) (dictum); see text accompanying notes 51-52 *supra*.

⁶⁶ See *Arizona-Monarch Merger Case*, *supra* note 65, at 248-49; *id.* at 253-54 (concurring opinion).

⁶⁷ *Southwest-West Coast Merger Case*, 14 C.A.B. 356 (1951); Gellman, *supra* note 24, at 171.

⁶⁸ 14 C.A.B. at 358.

⁶⁹ *West Coast-Empire Merger Case*, 15 C.A.B. 971 (1952).

several points,⁷⁰ the Board departed from its express policy of avoiding competition between feeders and trunklines.⁷¹ The Board was "persuaded"⁷² by the Examiner's report of the probability of substantially reduced expenses, new revenues, and less need for government subsidy.⁷³

The most recent local service application was rejected on facts similar to *Southwest-West Coast*.⁷⁴ The parties served uncomplementary trade areas on either side of the Chicago-Detroit line, and although a significant reduction in subsidy could have been effected, the unprecedented size of the resulting entity and the danger of long-haul route emphasis made merger undesirable—in effect, the Board disapproved of one local service carrier operating two feeder routes.⁷⁵

c. Summary

The pattern of Alaska merger decisions in the forties indicates that the Board has encouraged mergers of small, marginal carriers when duplication could be eliminated and economies secured; however, the Board has disallowed mergers that would permit an already large and profitable carrier to achieve overwhelming size and competitive advantage. In the local service cases, the Board vacillated from its declared policy of insulating feeder lines from trunkline competition and trunk-type pressures and confining their operations to limited areas.

2. Small and Medium-Size Trunk Mergers

In *Western Air Lines, Inc., Acquisition of Inland Airlines*,⁷⁶ two route systems were brought together even though integration would not result.⁷⁷ The dissent objected on the ground that one of the public interest factors was being ignored, but the Board found that poor management of operations, maintenance, personnel, and financing had contributed to Inland's difficulties, and that Western's superior management would promote safer, more efficient, and more economically sound operations on Inland's routes.

In the next acquisition case in this category, a purchase price higher than that previously considered reasonable was allowed in order to foster the development of an adequate airline system in New England.⁷⁸ Simi-

⁷⁰ See Empire Certificate Renewal Case, 15 C.A.B. 997 (1952).

⁷¹ See FULDA, *op. cit. supra* note 15, § 7.22, at 231.

⁷² 15 C.A.B. at 976.

⁷³ *Id.* at 979, 990.

⁷⁴ North Central-Lake Central Acquisition Case, 25 C.A.B. 156 (1957), *aff'd*, 265 F.2d 581 (D.C. Cir.), *cert. denied*, 360 U.S. 903 (1959).

⁷⁵ See Gellman, *supra* note 24, at 172-73.

⁷⁶ 4 C.A.B. 654 (1944).

⁷⁷ *Id.* at 661.

⁷⁸ Acquisition of Mayflower Airlines, Inc., by Northeast Airlines, Inc., 4 C.A.B. 680, *supplemental opinion*, 6 C.A.B. 139 (1944). It was also significant that the acquired carrier was in bankruptcy, had inadequate capital and obsolete equipment, and served vacation areas on the Massachusetts coast that were inaccessible by surface transportation.

larly, a merger of National Airlines—with routes along the Atlantic seaboard—and Caribbean Atlantic Airlines—running short-haul flights in Puerto Rico—was disapproved because there could be no fusion of two systems serving two different territories; “no development of an integrated and coordinated air transportation system” would result.⁷⁹

In 1952, trunklines were reduced by two as a result of Braniff's merger with Mid-Continent and Delta's merger with Chicago & Southern.⁸⁰ In both cases, although the Board emphasized the prospect of savings and increased revenues, the effect on the transportation system must have received tacit approval. Braniff's system ran north-south from Chicago to Texas and east-west from Memphis to Denver; Mid-Continent's routes from the Twin Cities to New Orleans and Houston clearly complemented Braniff's service. The Examiner found that through-plane service on four routes would attract new traffic and revenue and reduce expenses by \$523,000.⁸¹ Competition would be only slightly diminished, with no serious diversion from other carriers. Route integration in *Delta-Chicago & Southern* was not so clear.⁸² Delta flew from Chicago to Miami and east-west from Charleston, South Carolina to Ft. Worth; Chicago & Southern ran north-south through the midwest. However, the systems were contiguous at several points, and merger with Chicago & Southern could be viewed as strengthening the hypotenuse of the Delta triangle. In any event, “integration” and the “system” were hardly considered.⁸³ The Board found that merger would “augment” competition⁸⁴ by providing new one-plane service between many points with an attendant lowering of break-even load factors, better utilization of equipment and personnel, increased revenue, and reduced expense.

Shortly after the relatively easy approval of these two important mergers, the application of a small trunkline to acquire one of the largest local service carriers split the Board three to two in favor of approval.⁸⁵ So compelling were the factors of integration, improved service, and reduced subsidy that the majority was willing to deviate from the general policy of maintaining the independence of local service carriers; actually, the difference in classification in this case was largely semantic because of the unusual degree of economic, operational, and geographical similarity between the two carriers.⁸⁶

⁷⁹ National-Caribbean-Atlantic Control Case, 6 C.A.B. 671, 676 (1946). The Board also disapproved of the terms of the agreement.

⁸⁰ Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952); Delta-Chicago & Southern Merger Case, 16 C.A.B. 647 (1952). The labor conditions attached to the latter merger were approved in *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960).

⁸¹ 15 C.A.B. at 726-34.

⁸² In opposing the merger, Eastern foresaw a “sprawling network of nonintegrated routes.” 16 C.A.B. at 678.

⁸³ *But see id.* at 689-92 (Examiner's Report).

⁸⁴ *Id.* at 685.

⁸⁵ Continental-Pioneer Acquisition Case, 20 C.A.B. 323 (1955).

⁸⁶ *Id.* at 330-31.

Thus, the Board seems to have welcomed mergers which enlarged small trunklines as long as some integration, improved service, or economies could be effected without extreme anticompetitive or diversionary results. A more deliberate, hesitant approach is evident in cases involving the Big Four—United, American, TWA, and Eastern.

3. Big Four Mergers

The Board's policy of strengthening smaller trunks springs from its recognition that the route structure of the Big Four enables them to exploit major long-haul markets with low-fare service and dominate the industry.⁸⁷

The Board early formulated, in *United Air Lines Transport Corp.-Acquisition of Western Air Express Corp.*, the doctrine of a "reasonably balanced system of air transportation in every section of the country" to prevent United's acquisition of Western in 1940.⁸⁸ United had major east-west transcontinental routes; to have permitted it to swallow the only independent north-south trunkline on the west coast would have virtually eliminated all important competition, leaving one carrier with an overwhelming degree of control over western air transportation. In addition, an alternative solution to one of the problems which had prompted the merger request was available—equipment interchange agreements were approved to avoid inconvenient change of planes by sleeper passengers.⁸⁹

In *United-Western*, the Board indicated that although size alone is not determinative, "concentration of ownership and control . . . is fatal to the operation of a competitive economy."⁹⁰ Such fatal concentration was not found in *Acquisition of Marquette Airlines by TWA*, in which a transcontinental carrier was permitted to absorb a small carrier flying between Detroit and St. Louis.⁹¹ The monopoly proviso of section 408 was narrowly construed; monopoly was defined as one carrier on a route, and restraint on competition or jeopardy to another carrier was prohibited only insofar as one or both followed from the creation of a monopoly.⁹² The Board found that improved service and development of traffic potential accorded with the public interest.⁹³

Apparently in *American Airlines, Inc.-Acquisition of Mid-Continent Airlines*, forebodings of undesirable concentration caused the Board to

⁸⁷ The Board has attempted to fortify the smaller trunks through route awards and modifications. See *Southwest-Northeast Service Case*, 22 C.A.B. 52, 56 (1955) (quoted in note 23 *supra*).

⁸⁸ 1 C.A.A. 739, 750 (1940).

⁸⁹ *Id.* at 742.

⁹⁰ *Id.* at 750.

⁹¹ 2 C.A.B. 1, 9, *supplemental opinions*, 2 C.A.B. 409 (1940), 3 C.A.B. 111 (1941).

⁹² See notes 12-13 *supra* and accompanying text.

⁹³ For an unusual case in which improved service and better equipment utilization were achieved, with practically no effect on competition, by agreement nearly tantamount to acquisition, see *United Air Lines, Inc., Operation of Catalina Air Transport*, 6 C.A.B. 1041 (1946).

broaden its reading of the monopoly proviso.⁹⁴ Denial of the application was based primarily on the merger's effect on the "system"; annexation by the largest domestic air carrier whose routes stretched diagonally cross-country of an uncomplementary north-south system would lack the necessary integration and would facilitate diversion from American's competitors of connecting traffic originating from Mid-Continent's flights. The Board assured American that its size did not preclude merger and that the present denial was not intended to prevent further expansion of American's system;⁹⁵ however, the Board specified that size and competitive position must be considered, and that American—already the largest airline—would enjoy enormous competitive advantage merely because of its size and wide geographical scope.⁹⁶

Ten years later, Eastern's acquisition of Colonial was approved⁹⁷ in order to eliminate Colonial's dependence upon subsidy, although the Board did not attempt to distinguish *American-Mid-Continent* in which the prospect of subsidy reduction was held not to be controlling.⁹⁸ It is perhaps significant that Eastern was smaller than American and Colonial smaller than Mid-Continent. The Board found that Colonial could not be self-sufficient⁹⁹ but could be successfully integrated with Eastern. Colonial's routes from Canada to New York, Washington, and Bermuda coalesced easily with Eastern's system extending from the northeast to Texas, Louisiana, Florida, and Puerto Rico.

The most recent merger involving one of the Big Four—approved by the Board in 1961—was that of United and Capital.¹⁰⁰ The only alternative to merger with United was Capital's collapse. Although United gained a monopoly in nineteen markets by absorbing the fifth largest trunkline and became the largest domestic air carrier, 119 markets would have lost competitive service had Capital failed without any transfer of its route certificates.¹⁰¹ Capital's extreme situation derived from its total inability

⁹⁴ 7 C.A.B. 365 (1946).

⁹⁵ *Id.* at 379.

⁹⁶ *Id.* at 377-78. Compare the subsequent approval of Mid-Continent's merger with Braniff, notes 80-81 *supra* and accompanying text.

⁹⁷ The CAB first gave its approval in 1954; merger was denied, however, by the President, whose approval is required when an international air route is involved. See *Eastern-Colonial, Acquisition of Assets*, 18 C.A.B. 453, 781 (1954). After a finding that illegal control of Colonial by Eastern had been terminated, *Eastern-Colonial Control Case*, 20 C.A.B. 629 (1955), the merger was finally approved, notwithstanding Eastern's prior violation of the act. *Colonial-Eastern Acquisition Case*, 23 C.A.B. 500 (1956).

⁹⁸ See 18 C.A.B. at 782; SCHWARTZ, *FREE ENTERPRISE AND ECONOMIC ORGANIZATION* 167-68 (2d ed. 1959); Gellman, *The Regulation of Competition in U.S. Domestic Air Transportation: A Judicial Survey and Analysis*, 25 J. AIR L. AND COM. 148, 169 (1958).

⁹⁹ See 18 C.A.B. at 784.

¹⁰⁰ *United-Capital Merger Case*, 1A AV. L. REP. ¶21,132 (CAB April 3, 1961), *aff'd sub nom.* *Northwest Airlines, Inc. v. CAB*, 303 F.2d 395 (D.C. Cir. 1962). See generally Comment, 62 COLUM. L. REV. 851 (1962).

¹⁰¹ See *id.* at 871. Unlike the Board, the court of appeals found it unnecessary to invoke the "failing business doctrine." Compare *United-Capital Merger Case*, *supra* note 100, ¶21,132, at 14440-42, with *Northwest Airlines, Inc. v. CAB*, *supra* note 100, at 401-02.

to finance the purchase of competitive equipment.¹⁰² Intervening airlines, "frankly combating the possibility of a new and powerful competitor in place of a weak, partially moribund one,"¹⁰³ urged the Board to inquire into all possible alternatives; the Court of Appeals for the District of Columbia Circuit held that the CAB had properly limited the issues before it and was not required to launch "a reexamination of the route structure in the whole of the eastern half of the country."¹⁰⁴

Past merger cases involving one of the Big Four seem to indicate that an application by two of the Big Four is not the type that the Board sought to elicit by its recent broad suggestions of merger. In any event, it is doubtful that merger of American and Eastern could be approved without a reexamination of the entire route structure—the type of examination held to be unnecessary in *United-Capital*.

III. THE AMERICAN-EASTERN MERGER CASE

A. Background

The over-optimism of management in equipping and seeking expansion, the eagerness of the Board to grant competitive route awards and extensions, and the service demands of the public have probably all contributed to the airline industry's major problem—oversupply.¹⁰⁵ When in 1961 the trunklines produced more than 29 billion revenue passenger miles¹⁰⁶ but suffered losses of over \$30 million,¹⁰⁷ matchmaking efforts mushroomed. Early in 1962, most major airlines were contemplating merger; a Continental and National application was being prepared based on the prospect of better utilization of jet equipment by leveling seasonal variations, although there would be little elimination of duplication or reduction of competition. The application was withdrawn after the American-Eastern proposal was announced. Having lost \$5,400,000 in 1961, Eastern sought to link its north-south systems (Chicago-Cleveland-Boston-New York-Washington-Bermuda-Miami-Puerto Rico) to American's profitable east-west lines.

In hearings before the Examiner, American and Eastern have painted a dark picture of the industry and their own problems. Aggregate investment return has dropped from 11.6% in 1955 to 1.4% in 1961, whereas the Board has found that a return of 10.5% is necessary for trunkline

¹⁰² See Brief of Capital Airlines, Inc. to Assoc. Chief Examiner, *United-Capital Merger Case*, *supra* note 100.

¹⁰³ 303 F.2d at 399.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Address by CAB Chairman Boyd, Connecticut General Symposium, Hartford, Conn., Nov. 3, 1961, p. 2 [hereinafter cited as Boyd, Connecticut Address].

¹⁰⁶ *Id.* at 3.

¹⁰⁷ Time, Feb. 2, 1962, p. 59. In the first half of 1962, the nation's eleven trunk airlines lost 5½ million dollars because of too many costly jets and too few passengers. Time, Aug. 17, 1962, p. 70.

operation.¹⁰⁸ Eastern has stressed the intrinsic weakness of its route system which has extreme seasonal variations and one of the shortest average passenger hauls in the industry, which has been accentuated by the demands of jet financing, and which imaginative and vigorous management has not been able to overcome.¹⁰⁹ The CAB's Bureau of Economic Regulation (the Bureau) and the Justice Department concede overproduction, but they view 1960-61 as a recession period during which Eastern had two "bad years."¹¹⁰

B. The Merger Trend

The trend toward merger as a cure for poor profit ratios is not confined to the airlines; banks and railroads are also seeking to consolidate. Commercial banks claim that merger is necessary to enable them to meet outside competition from mutual savings institutions, savings and loan associations, finance companies, insurance companies, credit unions, commercial paper dealers, government-created lenders, and do-it-yourself corporate financing.¹¹¹ Although the banking industry is highly regulated, it has no specific antitrust exemption, and the Justice Department has been particularly zealous in opposing the bank merger movement.¹¹²

In the railroad industry, the ICC is swamped with merger cases and anticipates more applications in 1963.¹¹³ Six of these are of major significance, and one—the Pennsylvania-New York Central merger—would create such a concentration of economic power that Senator Kefauver has proposed "stop-gap" legislation to prevent ICC approval of any large merger before 1964.¹¹⁴ Railmen contend that a series of mergers is needed to establish a few large systems in each section of the country to eliminate duplication and secure economical operation; that coordinating agreements are not feasible; that railroads do not significantly compete with each other but with other forms of transportation; that the alternatives to merger are extinction or nationalization.

¹⁰⁸ Trial Brief of American Airlines, Inc. and Eastern Airlines, Inc., pp. 6-8, American-Eastern Merger Case, No. 13355, CAB, May 7, 1962 [hereinafter cited as American and Eastern Trial Brief].

¹⁰⁹ *Id.* at 36-38.

¹¹⁰ See Brief of Bureau of Economic Regulation, p. 18a; Brief of United States, p. 47, American-Eastern Merger Case, *supra* note 108 [hereinafter cited as Bureau Brief; U.S. Brief].

¹¹¹ See *The Bankers' Battle*, Wall Street Journal, Jan. 16, 1962, p. 10, cols. 5-6.

¹¹² See generally Note, 75 HARV. L. REV. 756 (1962); Funk, *Antitrust Legislation Affecting Bank Mergers*, 75 BANKING L.J. 369 (1958). There appears to be considerable disagreement between the Justice Department and banking authorities over proper antitrust controls. See, e.g., Wall Street Journal, Jan. 4, 1962, p. 1, col. 2. The Bank Merger Act of 1960, 12 U.S.C. § 1828(c) (Supp. II, 1960), can be read as an attempt to remove antitrust considerations from bank merger decisions. See H.R. REP. NO. 1416, 86th Cong., 2d Sess. 1960.

¹¹³ See *The Pennsy-Central Merger*, Forbes, Feb. 1, 1962, pp. 26-27; *A Merger Scoreboard*, Time, Aug. 17, 1962, pp. 70-71; Philadelphia Evening Bulletin, Aug. 13, 1962, p. 23, col. 5.

¹¹⁴ See N.Y. Times, April 4, 1962, p. 64, col. 3.

The airlines, whose major traffic growth has been at the expense of the railroads, have not yet taken up the railman's cry of "merge or die," but many are adopting the railroad goal of paring down to a few giant systems. Indeed, the Justice Department has characterized the American-Eastern proposal as introducing that goal into the air transport industry.¹¹⁵

C. The Precedential Value of Past Merger Decisions

Never before have two of the Big Four sought to join routes and resources. The American-Eastern combination would become the nation's largest air carrier and fourth largest common carrier, uniting nearly \$1,000,000,000 of assets and over \$700,000,000 of yearly operating revenues, and dominating both east-west and north-south air travel¹¹⁶ with 200,000 miles of pooled routes.¹¹⁷

On the map, the American-Eastern proposal closely resembles the route link-up in the recent *United-Capital Merger Case*,¹¹⁸ and will presumably create the same integration and service advantages. But approval in *United-Capital* was explicitly predicated on the need to prevent the complete collapse of the Capital system, whereas Eastern is in no danger of imminent collapse. Eastern has, therefore, cited and relied on the many mergers in which resulting economies were crucial factors leading to approval; yet the vast size and scope of the proposed combination cannot be disregarded, particularly when the Board has disapproved past mergers because of undue concentration and the likelihood of competitive imbalance. The Alaska-Cordova merger, for example, was rejected because it would enlarge a system which was already the giant of the area.¹¹⁹ The earlier attempt by transcontinental United to acquire a major north-south west coast line was thwarted because United would have then dominated western air travel.¹²⁰ Of course, the most striking precedent is the Board's disapproval of American's 1946 plan to acquire Mid-Continent.¹²¹ Although it denied that size alone was ground for disapproval, clearly the Board

¹¹⁵ See U.S. Brief, p. 1:

The merger application before the Board in this proceeding is admitted by the merger parties to constitute an open invitation to the Board to endorse a policy of radical restructuring of the air transportation system of the United States. The instant merger, say the applicants, should be but the first step in a series of airline mergers which should ultimately reduce substantially the number of domestic air transport companies.

See the citation to the "lesson of the railroads" in Brief of American Airlines, Inc., p. 8, American-Eastern Merger Case, No. 13355, CAB, July 31, 1962, [hereinafter cited as American Brief].

¹¹⁶ See Forbes, Feb. 1, 1962, p. 15; Philadelphia Evening Bulletin, Jan. 24, 1962, p. 1, col. 5.

¹¹⁷ News Release, Rep. Emanuel Celler, Chairman, Antitrust Subcomm. of House Comm. on the Judiciary, Jan. 24, 1962.

¹¹⁸ Compare Time Magazine, Feb. 2, 1962, p. 59, with Examiner's Initial Decision, United-Capital Merger Case, No. 11699, CAB, p. 83.

¹¹⁹ See note 58 *supra* and accompanying text.

¹²⁰ See notes 89-90 *supra* and accompanying text.

¹²¹ See notes 94-96 *supra* and accompanying text.

envisioned that too much concentration and competitive advantage would be derived from bigness alone if American were permitted to move north-south through the center of the nation.

Probably each of the "concentration" cases can be distinguished. American will not become the lone giant of domestic air travel that Alaska would have been in its region in 1944. And a north-south extension for American down the eastern seaboard will leave much more competition than would have existed on the west coast had United been permitted to absorb Western in 1940. In addition, Eastern's routes are more complementary, offering more integration advantages than did Mid-Continent's in 1946. Nevertheless, these distinctions cannot totally dispel the basic argument that overwhelming size and geographical reach not only distort an otherwise balanced system but place all other carriers at a competitive disadvantage. The potential air passenger is greatly swayed by more advertising of more flights over more routes to more destinations. Thus, American and Eastern can obtain approval only by persuading the Board that the considerations expressed sixteen years ago in *American-Mid-Continent* are no longer compelling because of changed circumstances.

D. Labor Protection, Efficiency, Economy, and Integration

After announcing their intention to merge, American and Eastern publicized the proposal on the basis of projected economies: complementary peak seasons would permit more effective use of fewer aircraft; savings of over \$50,000,000 a year would result from the elimination of overlapping routes and duplicating ticket counters, hangars, and other facilities at thirty common points; rising fares would be checked by a reduction in capital requirements of \$75,000,000; although initially there would be somewhat fewer jobs, the creation of a more profitable airline would ultimately increase employment.¹²²

The parties have attempted to substantiate these claims in hearings before the Examiner. Savings of over \$100,000,000 in capital expenditures were forecasted because of a diminished need for aircraft and parts resulting from complementary seasonal traffic peaks, fleet and route integration, and the elimination of overlapping services.¹²³ Also predicted were savings of over \$54,000,000 annually at 1965 levels in expenses for depreciation and interest, electronic data processing, advertising, flying hours, rentals and utilities, and personnel.¹²⁴ But the Bureau has warned that projected cost savings may not materialize since the merged carrier probably will expand service and require additional aircraft,¹²⁵ and expected economies

¹²² See, e.g., Joint Statement of Presidents of American and Eastern Airlines, Jan. 23, 1962; Time, Feb. 2, 1962, p. 59; *Why Airlines Are in Trouble*, U.S. News & World Report, Feb. 19, 1962, pp. 74-78.

¹²³ American and Eastern Trial Brief, pp. 24-27.

¹²⁴ *Id.* at 27-32; Brief of Eastern Air Lines, Inc., pp. 15-29, American-Eastern Merger Case, No. 13355, CAB, July 31, 1962 [hereinafter cited as Eastern Brief].

¹²⁵ Bureau Brief, pp. 21-24.

will be partially offset by "costs arising from the complicated process of combining the systems."¹²⁶ Generally, however, the Bureau, Justice Department, and intervening carriers concede that savings are likely to result but oppose the merger because of its impact on competition, other carriers, and the structure of the industry.

E. Competition and Bigness

According to American and Eastern, the salutary effects of competition are too costly. But overcapacity, the airlines' major problem, is not necessarily the result of too much competition; managerial miscalculation is at least partially to blame. Thus, elimination of competition between thirty common points of travel is of serious concern to the Board and to Congress.

The merging parties seek to divert attention from the Big Four to the "Sheltered Four"—Braniff, Western, Delta, and Continental—which they allege are more profitable because they remain "substantially sheltered from competition."¹²⁷ On the other hand, they contend that the proposed merger would not violate the monopoly proviso under the Board definition of one carrier on a route.¹²⁸ In fact, the asserted "genius of the American-Eastern merger, combining a basically north-south carrier with a basically east-west carrier, lies in the facts that . . . the carriers are not competitive except in markets where a reduction of the number of competitive carriers is clearly desirable, and . . . because the routes generally lie at right angles rather than being end-on, few new possibilities for effective competition against existing services will be created."¹²⁹ The airlines argue that "size *per se* is largely irrelevant,"¹³⁰ and that bigness alone is not the source of the economies they foresee and is not as significant in a service industry as in an impersonal product industry.¹³¹ They also point out that the merged carrier would account for less than one-quarter of total operating revenues and assets of the certified route industry and less than one-third of the total system revenues and assets of domestic trunklines; that the merged carrier would not be "a giant among corporations generally or even among transportation firms"; that "a high degree of concentration has been characteristic of the air transport industry quite without regard to the American-Eastern merger."¹³²

In one of his pro-merger addresses, Board Chairman Boyd noted a general adaptation of the business community toward increased concentration, and that "it takes a big company to sustain the burden of keeping pace

¹²⁶ Reply Brief of Bureau of Economic Regulation, August 13, 1962, p. 4.

¹²⁷ American and Eastern Trial Brief, p. 43; American Brief, p. 25.

¹²⁸ American Brief, pp. 41-42; Eastern Brief, pp. 46-49.

¹²⁹ American and Eastern Trial Brief, p. 23.

¹³⁰ *Id.* at 39.

¹³¹ See American Brief, p. 36.

¹³² American and Eastern Trial Brief, p. 39.

when aircraft cost some 5 to 6 million dollars apiece."¹³³ However, he then indicated that "mergers between the smaller airlines would seem to provide a means of accommodating this fact in an orderly manner."¹³⁴

Although conceding that size is not necessarily a measure of profitability, the Bureau has argued that the combination would dominate the trunkline industry and would be repugnant to the policies of the antitrust laws¹³⁵ as well as the monopoly proviso.¹³⁶ At the very least, therefore, the American-Eastern application should force the Board to reconsider and clarify its interpretation of the monopoly proviso of section 408(b).

F. Effect on the Industry

American and Eastern maintain that merger will strengthen the air transportation system, although there is little support for this contention in their briefs and exhibits. It is difficult to determine precisely how a greater profit potential for American-Eastern will benefit the entire industry, except that a larger and more efficient carrier can provide enhanced service to a greater number of passengers. The merged carrier would be so powerful that remaining trunklines, in order to compete, would probably be compelled to merge. Apparently it is this future system of a few super-airlines resulting from a series of mergers which American and Eastern regard as a stronger air transport structure;¹³⁷ in the American-Eastern Trial Brief, the parties expressly urged mergers of other carriers.¹³⁸ Thus, the statement made in a 1955 study of airline competition that "no one seriously contemplates or predicts that there will be a reduction to four or five trunks"¹³⁹ is obviously now outdated. Indeed, this was the optimum number of domestic trunklines proposed by the president of American Airlines.¹⁴⁰

According to American, the merger will improve the credit rating of the entire industry and increase public confidence; it will reduce excess duplication and off-season capacity and cause only slight diversion from other carriers.¹⁴¹ The intervenors' arguments, says American, amount

¹³³ Before the Economic Club of Detroit, Jan. 8, 1962, p. 5.

¹³⁴ *Ibid.*

¹³⁵ See note 15 *supra*.

¹³⁶ See Bureau Brief, pp. 45-65. See also U.S. Brief, pp. 3-15.

¹³⁷ See U.S. Brief, p. 2:

[T]he instant merger proposal raises in dramatic fashion the question of future direction which the nation's air transportation will take. The Board's decision in this case may either serve as an invitation to, if not impose an obligation upon other air carriers to undertake in self-defense, further mergers and concentration in the airline industry, or constitute an unmistakable reaffirmation of the basic competitive philosophy which has guided the Board in . . . fostering a sound air transportation system . . .

¹³⁸ American and Eastern Trial Brief, p. 42.

¹³⁹ Tipton & Gewirtz, *The Effect of Regulated Competition on the Air Transport Industry*, 22 J. AIR L. & COM. 157, 171 (1955).

¹⁴⁰ See *Why Airlines are in Trouble*, U.S. News & World Report, Feb. 19, 1962, pp. 74, 76.

¹⁴¹ American Brief, p. 21.

only to a vague claim that they will be overwhelmed by the size of the merged carrier.¹⁴² Although it believes that the merger will create no monopoly, American contends that the industry is already monopolistic in the sense that there are few airlines, that the merger "would not affect this basic structure of the industry,"¹⁴³ and that, in any event, CAB regulation would prevent monopolistic control of prices and service.¹⁴⁴

The Bureau, however, has underscored the potential conversion of the Big Four into a Big Two. After the American-Eastern merger, the Big Two would control approximately 60% of domestic air transportation, with the three biggest trunks accounting for 75%. American-Eastern itself would carry 35% of the traffic. Whereas merger of smaller carriers would promote competitive balance, the present merger would channel air transportation into the hands of a few carriers.¹⁴⁵ The Bureau concludes: "Based upon the evidentiary record . . . we see little opportunity for making the required findings that would justify a structural reconstitution of the basic pattern of domestic air service."¹⁴⁶

The competitive imbalance resulting from the American-Eastern merger might frustrate the Board's efforts to arrive at a fair rate level. Although a low fare level could be assimilated by the huge trunks, it might seriously endanger efficiently operated smaller carriers. A level high enough to satisfy the requirements of smaller and weaker trunks might give disproportionate profits to the Big Two.¹⁴⁷ The parties' solution to this and similar problems is "the creation of stronger, more profitable systems within the air transport industry."¹⁴⁸

IV. ALTERNATIVES TO MERGER

Although the Board has indicated a willingness to approve those mergers it considers desirable,¹⁴⁹ merger itself is an inefficient regulatory technique, mainly because the Board is powerless to initiate merger transactions.¹⁵⁰ Actually, government contracts guaranteeing mail payments have undercut the need for merger among subsidized airlines by removing the threat of bankruptcy. There is also an understandable disinclination on the part of top executives to negotiate away their high-level positions

¹⁴² *Id.* at 22-23.

¹⁴³ *Id.* at 35.

¹⁴⁴ *Id.* at 36.

¹⁴⁵ See Bureau Brief, pp. 6b-6d, 52-55.

¹⁴⁶ *Id.* at 39.

¹⁴⁷ *Id.* at 43-44 & n.67.

¹⁴⁸ Joint Statement of Presidents of American and Eastern Airlines, Jan. 23, 1962.

¹⁴⁹ CAVES, AIR TRANSPORT AND ITS REGULATORS 444-45 (1962), warns the Board not to encourage mergers.

¹⁵⁰ See Boyd, Connecticut Address, p. 5. Chairman Boyd considered mergers so necessary that he suggested that if the airlines do not take the initiative, the Board should institute studies to develop detailed criteria for mergers and to recommend specific carrier consolidations. *Ibid.*

in separate companies. Therefore, voluntary merger is likely to be prompted not by public interest considerations but by the possibility of economic advantage.¹⁵¹ And not only is merger comparatively infrequent, but it is a relatively drastic remedy for problems which may require delicate adjustment.

If reduction of airline competition is a proper goal, route planning, transfer, suspension, or revocation rather than carrier merger could be utilized. Problems of high debt ratios, low profits, and inefficient use of equipment might be better handled through managerial improvement and product promotion, subsidy and rate adjustment, equipment and financing regulation, or facilities-sharing and equipment-interchange agreements.¹⁵²

A. Rates, Subsidy, and Management

An obvious means of increasing revenue is to raise the overall fare level; past experience, however, has demonstrated that fare increases do not increase airline profits¹⁵³ and certainly will not expand traffic volume to utilize unemployed facilities. It is sometimes asserted that rates are now so high that air travel is a luxury service restricted mainly to expense-account executives and tourists on once-in-a-lifetime excursions. Although this assertion is less valid today than a decade ago, the airlines might nevertheless lower prices to attract more passengers. The American and Eastern response is that although promotional fares might accelerate traffic growth, a 300% increase in traffic in the past ten years has brought decreased earnings. Furthermore, they contend that it is impossible to sell air travel at a price competitive with the automobile.¹⁵⁴

A return to subsidy for unprofitable trunkline systems is probably unacceptable; certainly the advocate of competition would not prefer this remedy to merger. Yet short-haul feeders continue to enjoy subsidy, and some extension of the local service subsidy principle, for example, to the New England area in which trunkline service is primarily short-haul, might be warranted.

One solution is more imaginative and efficient management, although airline executives maintain that they are doing everything possible under the circumstances. Eastern itself through progressive management has instituted Air-Bus and Air-Shuttle services, hourly radio reports, and many advertising and service innovations; nevertheless, profits have not been forthcoming.

B. Equipping and Financing Regulation

Basically, it was the jet changeover that plunged the airlines into debt and brought Capital to the point of imminent collapse. Overequipping in

¹⁵¹ See Zook, *Recasting the Air Route Pattern by Airline Consolidations and Mergers*, 21 J. AIR L. & COM. 293, 311 (1954).

¹⁵² See, e.g., the suggestions in Bluestone, *The Problem of Competition Among Domestic Trunk Airlines*, 21 J. AIR L. & COM. 50, 81 (1954).

¹⁵³ See, e.g., American Brief, pp. 10-11.

¹⁵⁴ American and Eastern Trial Brief, p. 16.

response to rapid technological change has caused overcapacity with huge, half-empty planes in the air; deficits have resulted from the short trips flown by speedy, costly jets. And even though the Board has the responsibility of ensuring the carriers a fair return on their invested capital, it has no control over the largest single element of carrier investment—aircraft purchases.¹⁵⁵ Since 1942, the Board has been requesting this needed regulatory control over airline financing.¹⁵⁶

C. Route Suspensions and Transfers

If route awards have been the cause of injurious competition, the Board could resort to route suspension or revocation.¹⁵⁷ According to Board Chairman Boyd, "this will be done only if traffic does not warrant present services and they cannot be made economical through alternative means."¹⁵⁸ He prefers route transfers and mergers to suspension, reserving suspension for cases in which "competition is excessive to the point of ineconomy for the present and near future, and the carriers cannot and will not take action to offset losses arising from duplicative services."¹⁵⁹ Unless compelled by particular circumstances, route suspension would normally damage the affected carriers; similarly, extensive route transfer is unlikely to the extent that it is unrealistic to expect an airline to cut back on its route structure and significantly alter its competitive position.¹⁶⁰ Chairman Boyd has, however, persuasively summarized the advantages of transfer:

Route transfers are the small retail size of route realignment of which full mergers are the wholesale lots. Route transfers have the same basic requirements as mergers. . . . However, they can proceed on a much more selective basis. . . . Individual route transfers can be much more accurately tailored to take advantage of the benefits¹⁶¹

D. Agreements Between Carriers

Many of the service, economy, and equipment-use gains accomplished through merger could be achieved by sharing agreements between inde-

¹⁵⁵ See Address by CAB Chairman Boyd, Economic Club of Detroit, Jan. 8, 1962, p. 3.

¹⁵⁶ See 1942 CAB ANN. REP. 14; Trans World Airlines, Inc., Further Control by Hughes Tool Co., 12 C.A.B. 192, 224 (1950); note 155 *supra*.

¹⁵⁷ United Air Lines, Inc. v. CAB, 198 F.2d 100 (7th Cir. 1952) discusses the Board's power of suspension. See Federal Aviation Act of 1958, §§ 401(g), 402(f), 609, 72 Stat. 756, 758, 779, 49 U.S.C. §§ 1371(g), 1372(f), 1429 (1958).

¹⁵⁸ Boyd, Connecticut Address, p. 4.

¹⁵⁹ *Ibid*.

¹⁶⁰ Yet Eastern has transferred several of its routes to local service carriers in recent years. Bureau Brief, p. 16.

¹⁶¹ Boyd, Connecticut Address, p. 7. See also note 14 *supra*.

pendent carriers.¹⁶² For example, equipment-interchange or through-flight leasing arrangements have been used to eliminate the inconvenience of changing planes.¹⁶³ In 1947, Pan American and Panagra combined such an agreement with one enabling Panagra to use Pan American's sales, maintenance, and training facilities.¹⁶⁴ More recently, airplane exchange between Pan American and National enabled each carrier to counterbalance the effects of its seasonal traffic peaks and valleys.¹⁶⁵ Even pooling arrangements are lawful under the Act, although the Board has not encouraged them.¹⁶⁶

Although it may seem that joint-use agreements should be more attractive than merger to airline executives,¹⁶⁷ airmen generally dismiss these agreements as impractical. American contends that excessive competition impedes cooperation, and that overlapping traffic demands and conflicting and changing requirements make airlines reluctant to commit themselves to binding contracts. American also argues that past agreements have almost always proved unsatisfactory, "largely because separate managements have all kinds of problems that make such joint ventures unwieldy."¹⁶⁸ The Bureau counters that the seasonal patterns of American and Eastern are normal, recurring, and predictable, "ideal" for mutual accommodation through leasing arrangements.¹⁶⁹

V. CONCLUSION

Despite the existence of various alternative solutions to airline problems, there is general agreement that merger affords the most effective means of correcting excessive competition and capacity.¹⁷⁰

In the past, the Board has favored limited competition, and there is no indication at present of any change in policy.¹⁷¹ According to Chairman Boyd, each carrier must be sufficiently large to command the financial resources necessary to operate expensive jet fleets and prepare for the coming era of supersonic transport; competitive balance among such carriers is best achieved "with two carriers on a route between fairly large cities."¹⁷² It has been urged, however, that the advantages of competition are too

¹⁶² Statutory provisions governing agreements are: Federal Aviation Act of 1958, §§ 404(a), 408(b), 412, 72 Stat. 760, 767, 770, 49 U.S.C. §§ 1374(a), 1378(b), 1382 (1958).

¹⁶³ Subject to Board approval pursuant to §§ 408 and 412. See generally Winkelhake, *Interchange Service Among the Airlines of the U.S.*, 22 J. AIR L. & COM. 1, 26 (1955).

¹⁶⁴ See Pan American-Panagra Agreement, 8 C.A.B. 50 (1947).

¹⁶⁵ However, National continued to seek a more permanent solution through merger. See *Weak Medicine?*, Forbes, Jan. 15, 1962, pp. 32-34. See also Capital Airlines, Inc.-National Airlines, Inc., Interchange of Equipment, 10 C.A.B. 231 (1949), 10 C.A.B. 564 (1949).

¹⁶⁶ See Bluestone, *supra* note 152, at 82.

¹⁶⁷ See Boyd, Connecticut Address, p. 4.

¹⁶⁸ American Brief, pp. 11, 12 & n.1.

¹⁶⁹ Bureau Brief, pp. 29-30. See also U.S. Brief, p. 49 & n.91.

¹⁷⁰ See, e.g., Boyd, Connecticut Address, p. 4; American Brief, p. 3 & n.1.

¹⁷¹ See Boyd, Connecticut Address, p. 6.

¹⁷² *Id.* at 7.

expensive in a highly regulated industry.¹⁷³ But there are those who insist that free enterprise principles should be relaxed only when regulatory objectives would otherwise be defeated.¹⁷⁴ In its search for an accommodating philosophy, the CAB has apparently adopted a pragmatic middle ground. In a regulated service industry, the choice between beneficial mergers and classic antitrust doctrines depends ultimately on which approach will better promote a vigorous transportation system.

On the basis of past merger decisions and recent statements by Board members and counsel, a merger of two or three smaller trunklines which would eliminate duplication but leave some competition is the type most likely to be approved. Even with a series of such mergers, however, it is doubtful that the industry will gain stability without a sharp and sustained upturn in business. Two of the industry's Big Four have, therefore, boldly challenged the Board's policy by proposing an unprecedented merger.¹⁷⁵

In hearings and briefs, American and Eastern have emphasized both the economies that would result and Eastern's financial difficulties. Nevertheless, the savings, should they materialize, are not so attractive, nor Eastern's situation, if more than temporary, so dire as to overshadow the fundamental issues of bigness, concentration, competition, and systemic balance. If the Board is not persuaded that merger will significantly benefit the industry as well as the parties, a decision departing from past Board policy and setting off a consolidation scramble is highly unlikely.

The CAB could easily reject the American-Eastern proposal with an *American-Mid-Continent*-type opinion based on bigness and competitive imbalance. But whether it approves or disapproves, the Board should not decline the opportunity to redefine the monopoly proviso and clarify its position on the desirable extent of competition and the role of the antitrust laws in the regulation of air transportation. Also, the Board cannot properly approve the merger without undertaking a thorough reexamination of the national route structure and establishing guidelines for other carriers in their then inevitable search for merger mates.

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¹⁷³ See Bluestone, *supra* note 152, at 50-52.

¹⁷⁴ See FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION § 14.2 (1961); note 15 *supra*.

¹⁷⁵ The crucial nature of the issue presented by the American-Eastern application is well expressed in the Bureau Brief, p. 37:

We are now at a crucial juncture. Major decision regarding the future of air transportation must be made. The application for merger poses fundamental questions, and its resolution will determine, in large part, the development of the domestic air service patterns. If the Board were to sanction the combining of these two carriers, the disparity in size between each of the dominant few and the more numerous but less powerful smaller trunks would be more pronounced than at any other time since the enactment of the regulatory legislation. Merger approval would, in effect, repudiate the principle of balanced competitive service and nullify a policy that has been a tenet of the decisional process. Such a sharp reversal would put an end to the Board's long-standing policy which seeks an adjustment of the size disparity between the larger and smaller trunks.